No. 94-1471 (13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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I.

BREACH OF FIDUCIARY DUTY CLAIMS MAY ONLY BE COMMENCED ON BEHALF OF PLANS, NOT INDIVIDUALS

There is no dispute in this action about what the relevant sections of ERISA say. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)

(1988), permits a civil action to be commenced by a participant or beneficiary: plaintiffs are participants and beneficiaries. Section 502(a)(3) authorizes "appropriate equitable relief" to redress acts that violate "any provision of this subchapter." Plaintiffs seek equitable relief.

What is at issue here, however, is not whether plaintiffs may seek such relief. It is whether they may seek relief for themselves or whether they may do so only on behalf of a plan. The answer to that question is not to be found in the language of § 502(a)(3) itself: like the language of ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988), which also permits civil actions to be commenced by "a participant, beneficiary or fiduciary", the language in § 502(a)(3) permitting claims by the same people simply does not itself address the question of whether claims for breach of fiduciary duty may be asserted on behalf of individuals.[1] The assertion that the "unqualified text" of § 502(a)(3) permits "individualized relief" (Brief *Amicus Curiae* of the United States ("U.S. Br.") 9) is simply not supported by the text of the section.

The answer to the question of whether § 502(a)(2) permitted individual claims was held in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), to be found in ERISA § 409, 29 U.S.C. § 1109 (1988), a section referred to explicitly in § 502(a)(2) and one that this Court held was limited to plan-related relief. So with § 502(a)(3); focus must be directed to the specific provision that provides the basis of the claim.

[1] Like the opposition here, the Ninth Circuit in *Russell* had maintained that, based upon the plain language of § 502(a)(2), a "participant" or "beneficiary" could recover "appropriate equitable or remedial relief." *Russell* v. *Massachusetts Mutual Life Insurance Co.*, 722 F.2d 482, 490 (9th Cir. 1983), *rev'd*, 473 U.S. 134 (1985). In noting Congress's intent that "actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole," *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 142 n.9 (1985), however, this Court refused to allow the specific, plan-based remedies set forth in the the statute to be overcome by the generalized language referring to " 'equitable or remedial relief as the court may deem appropriate.' " 473 U.S. at 140.

According to plaintiffs and their *amici* allies, that provision is ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1988 & Supp. V 1993). But § 404(a) sets forth, by its terms, only what it characterizes as the "prudent man standard of care"; it says no more. It offers no provision for liability; it sets forth no remedies.[2] Liability under and remedies for breach of the standard of care set forth in § 404(a)(1) are explicitly and unambiguously imposed by § 409.

Plaintiffs' argument that notwithstanding § 409, a claim under § 404(a)(1) may be asserted by an individual for non-plan-based relief simply avoids the plain language of the statute. Section 409, entitled "Liability for breach of fiduciary duty", is the provision that "makes fiduciaries liable for breach" of the duties set forth in § 404(a)(1). *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2066 (1993). On its face, § 409 addresses the universe of breach of fiduciary duty issues—the existence of and circumstances for imposing liability, the circumstances when no liability may be imposed, and the remedies for a breach. Section 409(a) is addressed to "*[a]ny* person who is a fiduciary with respect to a plan who breaches *any* of the responsibilities, obligations, or duties imposed" by Title I of ERISA. ERISA § 409(a), 29 U.S.C. § 1109(a) (1988) (emphasis added).[3] Section 409(b) provides

[2] The legislative history confirms that the principles embodied in § 404(a)(1) were not about remedies at all. That section simply "incorporate[d] core principles of fiduciary *conduct*." S. Rep. No. 127, 93d Cong., 1st Sess. 30 (1973), *reprinted in* Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of Employee Retirement Income Security Act of 1974* ("Leg. Hist.") 587, at 616 (Comm. Print 1976) (emphasis added). *See* G. Bogert, *Trusts* § 95, at 343 (6th ed. 1987) (trustee's duty of loyalty is distinct from remedies for breach of duty).

[3] The United States asserts that the language of § 404(a)(1) referring to a fiduciary "with respect to a plan" suggests individualized relief. (U.S. Br. 11 n.11) But the language cuts in precisely the opposite direction. Under *Russell*, § 409 provides only plan-based remedies. Section 409(a) employs precisely the same language as § 404(a), making liable a "fiduciary with respect to a plan". *See Russell*, 473 U.S. at 140 ("the

that a fiduciary will not be liable for any breach if it was "committed before he became a fiduciary or after he ceased to be a fiduciary." ERISA § 409(b), 29 U.S.C. § 1109(b) (1988). Given Congress's considered decision to include § 409 to provide the explicit means of imposing liability (and remedies) for breach of fiduciary duty, the notion that liability may be imposed under a provision—§ 404(a)(1), which articulates nothing more than a standard of care, the violation of which is expressly made actionable under § 409—is inconsistent with the plainest of plain-language statutory readings.

Even were the statutory language of the part of ERISA dealing with fiduciary duties less clear, the very specificity of § 409 should be held under long-standing principles of statutory interpretation to bar plaintiffs' claim. *E.g.*, *HCSC-Laundry* v. *United States*, 450 U.S. 1, 6, 8 (1981) (per curiam); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957); *Clifford F. MacEvoy Co.* v. *United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932). (Brief of Petitioner ("Pet. Br.") 21-22) Plaintiffs and their *amici* insist that the rule of these cases only applies where some sort of "conflict" or "dissonance" exists between general and specific statutory provisions. (*See* Brief of Respondents ("Pl. Br.") 24; U.S. Br. 14) But that simply begs the question. Dissonance there was, for example, in *HCSC Laundry*—but only because giving effect to the general provision would have allowed a broader exemption than that plainly available under the specific provision. 450 U.S. at 6, 8. The same is true here.

relevant fiduciary relationship [is] characterized at the outset as one 'with respect to a plan' "); *accord Farr* v. *US West, Inc.*, 58 F.3d 1361, 1364 (9th Cir. 1995) ("[U]nder § 1104 as well as § 1109, plaintiffs' recovery 'is limited to relief protecting the integrity of the plan as a whole and does not extend to individual participants.' "). Under the United States' reading, the phrase "with respect to a plan" would have different meanings in nearby subsections of the same subchapter. It is not a statutory reading favored by this Court with respect to ERISA, *Mertens*, 113 S. Ct. at 2070, or any other statute. *E.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992).

Because § 409 is the liability provision for breach of fiduciary duty, it necessarily follows that while an individual may sue under § 502(a)(3) for breach of fiduciary duty, he or she must meet the § 409 standards set forth by this Court in *Russell*.[4] That being so, an individual may only sue on behalf of a plan.[5]

Two of plaintiffs' *amici* attempt to harmonize the plan-based limitations set forth in §§ 409 and 502(a)(2) with the notion of individualized cause of action for breach of fidu-

[4] Plaintiffs' approach to the statute—reading generalized phrases of ERISA in isolation to apply to a given issue, without regard to what Congress has said elsewhere in detail on that very issue—was also rejected by this Court in *Mertens*. There, a majority of the Court expressed skepticism that any cause of action exists under § 502(a)(3) for a non-fiduciary's participation in a fiduciary's breach of duty. Petitioners and their *amici*, including the United States, had argued in that case that the non-fiduciary plainly had engaged in activities violative of subchapter 1 of ERISA, and so could assert a claim under § 502(a)(3). (Brief of the United States as *Amicus Curiae*, *Mertens* v. *Hewitt Associates*, No. 91-1671, dated Nov. 1992 ("U.S. *Mertens* Br.") 9) The Court acknowledged that "ERISA contains various provisions that can be read as imposing obligations upon non-fiduciaries," 113 S. Ct. at 2067, but noted that "no provision explicitly requires them to avoid participation . . . in a fiduciary's breach." *Id.* The Court emphasized, moreover, that it was "unlikely . . . this was an oversight, since ERISA does explicitly impose 'knowing participation' liability on cofiduciaries." *Id.*

[5] *Accord, e.g.*, *Farr* v. *US West, Inc.*, 58 F.3d at 1364; *Whisman* v. *Robbins*, 55 F.3d 1140, 1149 (6th Cir. 1995); *Vespasian* v. *Sweeney*, No. 93-4343, 1995 WL 154982, at *6 n.3 (6th Cir. Apr. 6, 1995) (unpublished disposition); *Kayes* v. *Pacific Lumber Co.*, 51 F.3d 1449, 1462 (9th Cir. 1995) (dicta), *petition for cert. filed*, No. 95-220, 64 U.S.L.W. 3103 (Aug. 7, 1995); *McLeod* v. *Oregon Lithoprint Inc.*, 46 F.3d 956, 960 (9th Cir. 1995); *Adcox* v. *Teledyne, Inc.*, 21 F.3d 1381, 1390 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994); *Armstrong* v. *Jefferson Smurfit Corp.*, 30 F.3d 11, 13 (1st Cir. 1994) (expressing skepticism that § 502(a)(3) allows individualized relief); *Simmons* v. *Southern Bell Telephone & Telegraph Co.*, 940 F.2d 614, 617 (11th Cir. 1991); *Horan* v. *Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1417 (9th Cir. 1991); *Bryant* v. *International Fruit Product Co.*, 886 F.2d 132, 135 (6th Cir. 1989) (per curiam); *Sokol* v. *Bernstein*, 803 F.2d 532, 536 (9th Cir. 1986); *Richards* v. *General Motors Corp.*, 850 F. Supp. 1325, 1336-41 (E.D. Mich. 1994).

ciary duty under § 502(a)(3) by suggesting that because Congress was somehow more concerned with plan-related mismanagement, it provided a broader category of relief in § 409 than the "more limited" equitable relief available under § 502(a)(3). (U.S. Br. 14; *see* Brief *Amicus Curiae* of the American Association of Retired Persons 12) This is *post hoc* rationalization in the extreme: by this reading, Congress not only intended to establish two separate categories of relief for breach of fiduciary duty—something for which there is absolutely no support in the legislative history[6]—but did so by enacting a subsection, § 409, entitled "[l]iability for breach of fiduciary duty", which authorized relief for only one of the two categories. Particularly with reference to a statute so carefully drafted, it is difficult to credit the notion that Congress sought to calibrate different categories of liability and relief to different types of fiduciary duty claims but simply did not say so.[7]

Nor is any "gap" left on the enforcement scheme by limiting to plan-based remedies claims for breach of the duties set forth in § 404(a)(1). ERISA directly and unambiguously addresses Congress's central concern as to individuals: the provision of promised benefits. *See Russell*, 473 U.S. at 142. Section 502(a)(1)(B) authorizes an individual participant or beneficiary to bring a civil action "to recover benefits due to

[6] Indeed, the extensive legislative history reviewed by this Court in *Russell* makes clear that Congress did not differentiate between individualized and plan-based actions in imposing liability and providing remedies for breach of fiduciary duty. 473 U.S. at 141 n.8.

[7] We note that the United States' latest look at congressional intent in this respect (*see* U.S. Br. 14) conflicts with the position it took before this Court two years ago in *Mertens*. In *Mertens*, the United States argued that in providing for "equitable relief" under § 502(a)(3), Congress intended to include recovery of damages. (U.S. *Mertens* Br. 13-14) Reading the statute that way—to allow individuals suing under § 502(a)(3) to recover damages also recoverable under § 502(a)(2), *Mertens*, 113 S. Ct. at 2070—is hardly consistent with the the United States' current assertion that Congress deliberately chose to *limit* individualized relief in § 502(a)(3) so as not to permit damage awards. (U.S. Br. 14.)

him under the terms of his plan, to enforce his rights under the terms of this plan, or to clarify his rights to future benefits under the terms of his plan . . . ." ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) (1988). This language is broad indeed, is directly addressed to the recovery of benefits and incorporates fiduciary standards of conduct;[8] it authorizes the awarding of benefits through a variety of remedial devices, including declaratory judgment, injunction, or monetary relief. *Russell*, 473 U.S. at 147; *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 108 (1989); *Novak* v. *Andersen Corp.*, 962 F.2d 757, 759 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993).[9] In this case, plaintiffs sought and failed to

[8] The rights and remedies codified in § 502(a)(1)(B) are themselves derived from the common law of trusts, *see Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-11 (1989), and "[c]ourts generally apply trust law principles derived from state and federal common law in interpreting plan documents and adjudicating benefit claims." *Employee Benefits Law*, at 207 (S. Sacher, J. Gibbs, H.J. Shapiro, *et al.* eds. Supp. 1994). Even where a benefit plan gives an administrator "fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan", *Firestone*, 489 U.S. at 115, when the "administrator or fiduciary is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining an abuse of discretion.' " *Id.* at 115. Thus, Justice Brennan's concern expressed in his *Russell* concurrence that there be "enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans," *Russell*, 473 U.S. at 158, was addressed by this Court's decision in *Firestone*. (Of course, Justice Brennan's other query—"whether and to what extent extracontractual damages are available under § 502(a)(3)", 473 U.S. at 150—was answered by *Mertens*: they are not. *Mertens*, 113 S. Ct. at 2068).

[9] Complementing its broad remedies for obtaining benefits, § 502(a)(1) also addresses Congress' concern that individuals obtain information so as to ensure that they "know[ ] exactly where [they] stand[ ] with respect to the plan." H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973), *reprinted in* Leg. Hist. 2348, at 2358. Section 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A) (1988), allows a participant or beneficiary to initiate a civil action to obtain the monetary award provided in ERISA § 502(c), 29 U.S.C. § 1132(c) (Supp. V 1993). That section provides that an administrator who refuses to comply with requests for required information shall be "personally liable *to such participant*

establish an entitlement to benefits under § 502(a)(1)(B). They did not seek a writ on that issue.

The decision in this case, in fact, well demonstrates that permitting recovery under a § 404(a)/§ 502(a)(3) nexus that is barred under § 409 (and its corresponding civil enforcement provision, § 502(a)(2)) threatens to swallow entirely the long-standing body of law under which individuals can seek benefits via § 502(a)(1)(B). In the past two decades, literally hundreds of decisions from all the circuits have delineated a comprehensive body of rules applicable to claims for the recovery of, or eligibility for, benefits—rules based in the first instance upon the written plan terms themselves and which limit and qualify the circumstances under which plaintiffs can obtain benefits.[10] These rules should have been dispositive in this case; the court of appeals concluded that plaintiffs were not entitled to benefits under § 502(a)(1)(B). (PA 8a-9a) Nonetheless, the court awarded the same benefits to plaintiffs under § 502(a)(3). (PA 18a) However that relief is characterized—as "damages" or as "restitution"—one thing cannot be disputed: the only relief plaintiffs obtained was benefits under the MF Plan. *That* relief is plainly the domain of § 502(a)(1)(B). *See Livolsi* v. *Ram Construction Co.*, 728 F.2d 600, 603 (3d Cir. 1984) (where plaintiffs "seek back benefits owed them personally" as opposed to suing "as repre-

or beneficiary in the amount of up to $100 a day" and that the administrator shall be subject to "such other relief" as the court deems proper. ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1) (Supp. V 1993) (emphasis added).

[10] Thus, claims for benefits are determined by the written plan terms and only where those terms are ambiguous will courts admit extrinsic evidence—oral representations, past practice, informal writings—to discern whether employees were promised benefits, or to give effect to their reasonable expectations. *E.g.*, *Averhart* v. *US West Mangement Pension Plan*, 46 F.3d 1480, 1485-86 (10th Cir. 1994). When plan administrators enact invalid amendments to plans, courts have refused to give effect to such amendments. *E.g.*, *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir. 1990).

sentatives of the trust fund", § 502(a)(1)(B) is appropriate remedial vehicle, not 502(a)(3)).

Plaintiffs and their *amici* devote pages of argument to the proposition that § 502(a)(3) is the last line of defense for individuals aggrieved by rapacious employers. (*E.g.*, Pl. Br. 24, 26-27, 29; U.S. Br. 15; Brief *Amicus Curiae* of National Association of Securities and Commercial Law Attorneys 22-25) Tellingly, not a single case they cite, nor even a single hypothetical they postulate, involves the pursuit of anything other than benefits or eligibility for benefits. But § 502(a)(1)(B) itself exists to assure that benefits are paid when they are owed, *Russell*, 473 U.S. at 144. Using § 502(a)(3) as an end run around the provisions of § 502(a)(1)(B) is as unacceptable as using it to avoid the strictures of § 502(a)(2).[11]

[11] Nor does reading § 404(a)(1) in light of § 409—which is, after all, the liability provision Congress explicitly enacted—"read out of § 502(a)(3)" any "critical feature". (Pl. Br. 24) Section 502(a)(3) provides a broad range of civil actions for violations other than those made sanctionable in § 409. For example, an employee wrongfully discharged in violation of ERISA § 510, 29 U.S.C. § 1140 (1988), may seek back pay, reinstatement, front pay or other equitable relief. *E.g.*, *Schwartz* v. *Gregori*, 45 F.3d 1017 (6th Cir. 1995), *petition for cert. filed*, No. 94-2035, 63 U.S.L.W. 3892 (June 12, 1995); *Kross* v. *Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983). Fiduciaries, as well as individuals, may sue employers under § 502(a)(3) to compel payments to multiemployer plans where non-fiduciary employers violate ERISA § 515, 29 U.S.C. § 1145 (1988). *E.g.*, *Carpenters Southern California Administrative Corp.* v. *Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984); *Molina* v. *Mallah Organization, Inc.*, 804 F. Supp. 504 (S.D.N.Y. 1992). (*See* Pet. Br. 25-26)

II.

VARITY WAS NOT ACTING IN ITS FIDUCIARY CAPACITY IN COMMUNICATING WITH EMPLOYEES AS TO MCC'S PROSPECTS

Should this Court hold that ERISA allows individual relief for a breach of fiduciary duty under § 502(a)(3), this case then raises the question of whether Varity's communications with its employees were fiduciary in nature and could thereby result in a breach of fiduciary duty. After concessions necessitated by the law and the facts, the opposition briefs have narrowed the issue here to conduct—Varity's affirmative representations of MCC's future financial viability—that falls well outside the purview of ERISA fiduciary conduct under the statutory provisions and legal principles that govern here.

The key legal propositions with which to begin the analysis are not in dispute: Under the functional definition of "fiduciary" in ERISA § 3(21)(A) "a person is a fiduciary with respect to a plan *to the extent* . . . he has any discretionary authority or discretionary responsibility *in the administration of such plan*". ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988) (emphasis added). Thus, an employer who also acts as a plan administrator does not for that reason act in a fiduciary capacity for all purposes and at all times. *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223, 1228 (1995); *see Mertens*, 113 S. Ct. at 2072. Moreover, " '[a] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.' " *Curtiss-Wright*, 115 S. Ct. at 1228 (quoting *Adams* v. *Avondale Industries, Inc.*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990)). All agree that such business decisions fall outside the definition of "plan administration". *See Musto* v. *American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) ("There is a world of difference between administering a welfare plan in accordance with its terms and deciding what those terms are to be."), *cert. denied*, 490 U.S. 1020 (1989).

There is consensus, as well, that, as the United States puts it, "the express requirements of the Act provide the basic structure for plan administration." (U.S. Br. 27) ERISA has erected an elaborate scheme of regulations "built around reliance on the face of written plan documents". *Curtiss-Wright*, 115 S. Ct. at 1230.[12] The administrator has a duty to "run the plan in accordance with the currently operative, governing plan documents." *Id.* at 1231. It is firmly established that the obligation of employers to continue to provide welfare benefits depends solely upon the terms of the applicable benefits documents; any entitlement to benefits is governed by ordinary principles of contract interpretation. (*See* Pet. Br. 34 (collecting cases))[13]

To effectuate the statute's written plan mandate, Congress enacted a "thorough" "informational scheme" of reporting and disclosure obligations. *Curtiss-Wright*, 115 S. Ct. at 1231. ERISA requires employers to distribute summaries of the current plan and requires them to make available for inspection all "*currently* operative, governing plan documents." *Id.* at 1230-31 (emphasis added; citing ERISA §§ 102-104, 29

[12] Thus, an ERISA fiduciary must establish a plan through a "written instrument", ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988), and must "discharge his duties . . . in accordance with the documents and instruments governing the plan". ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (Supp. V 1993).

[13] The purpose behind reliance on written plan documents is simple and is at the heart of the statute:

> "Were all communications between an employer and plan beneficiaries to be considered along with SPDs as establishing the terms of a welfare benefits plan, the plan documents and the SPDs would establish merely a floor for an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently substantial disincentives for even offering such plans would be created."

Moore v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *accord, e.g., Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1442 (1995).

U.S.C. § 1022-1024 (1988 & Supp. V 1993)). That scheme not only does not require an employer to tell employees whether it intends in the future to terminate benefits, it explicitly contemplates that employees need *not* be told of such impending events. Under ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1) (1988 & Supp. V 1993), any modification or change to benefits need not be disclosed until 210 days *after* the end of the plan year in which the change was implemented. *See Curtiss-Wright*, 115 S. Ct. at 1230.

The court below affirmed a breach of fiduciary duty based on (i) misleading statements as to MCC's financial future; (ii) failure to provide more complete information on the risks of accepting employment with MCC; and (iii) a supposed failure to repeat the reservation of the right to amend or terminate benefits. (PA 3a-5a) Again, the opposing briefs have usefully narrowed the issues.

Unable to address petitioner's demonstration that ERISA's affirmative disclosure obligations are expressly enumerated in the statute and that those obligations had been met (*see* Pet. Br. 36-40), plaintiffs and the United States have virtually abandoned any argument that Varity breached any fiduciary duty by failing to disclose facts to its employees. (Pl. Br. 30 ("this is *not* a case about whether an ERISA fiduciary has a duty to disclose facts to beneficiaries beyond the specific mandatory disclosures enumerated in the statute"); *see* U.S. Br. 21-22 & n.19)[14]

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[14] The detail and clarity of ERISA's reporting and disclosure provisions strike at the heart of any argument that an employer acts as a fiduciary under § 404(a)(1) when it fails to disclose its intent to change plan terms, a proposition which underlies nearly all of the cases plaintiffs cite. (*See* Pl. Br. 39). Where ERISA has spoken directly to *what* must be disclosed and *when*, using the general language of § 404(a) to impose new disclosure duties would render the express disclosure provisions nugatory. *See Porto* v. *Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987) (per curiam) ("The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. . . . A plan administrator's duty to disclose information to plan participants is another matter, dealt with sep-

As to misrepresentations,[15] conspicuously absent from the opposing briefs—and from the decisions below—is any assertion that Varity misrepresented benefit *plan terms*. Indeed, as the United States concedes, the only affirmative representation at issue specifically about *benefits*—that benefit programs would "remain unchanged" from MF to MCC—was *true*. (U.S. Br. 26 n.23; *see* Pet. Br. 7) Neither court below found that Varity had misrepresented plan terms or that the plan had promised lifetime benefits.[16] Neither court found that the MCC Plan itself was "administered" in any way other than in accordance with its terms, or that while MCC was in existence, plaintiffs were not provided with all of the benefits to which they were entitled under that plan. And it is undisputed that plaintiffs were told of the reserved right to amend or terminate benefits in 1983, well before they lost benefits.[17]

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arately by ERISA."), *cert. denied*, 485 U.S. 937 (1988); *cf. Curtiss-Wright*, 115 S. Ct. at 1229 (no duty to disclose detailed procedure for amending plan).

The opposition's repeated references to trust principles to justify imposing additional fiduciary duties (Pl. Br. 37, 38-39; U.S. Br. 20-23 & nn.18, 19) cannot overcome the express provisions of the statute. *Mertens*, 113 S. Ct. at 2071-72. In any event, trust principles, which assume fiduciary conduct, only beg the question of whether the conduct at issue here was undertaken in a fiduciary context at all.

[15] As to the ten individual plaintiffs who never worked for MCC, both the United States and plaintiffs concede as they must that "[n]o misrepresentations were made to the individual respondents in connection with the transfer to MCC of petitioner's obligation to pay benefits." (Pl. Br. 43; *see* U.S. Br. 18 n.16) Thus, there is *no* basis for affirming the decision below as to that group; they simply lost benefits to which they had no contractual right under the Eighth Circuit's own ruling. (PA 9a)

[16] Thus, the opposition's reliance (*e.g.* Pl. Br. 35-36; U.S. Br. 23 n.20, 27 n.24) upon *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 57 F.3d 1255, 1264 (3d Cir. 1995), where the court found that the company "had affirmatively and materially *misrepresented the terms of a plan* . . ." (emphasis added), is misplaced.

[17] Plaintiffs simply flee the scene of the 1984 CMMP Memo, which the district court found was disclosed to all employees and retirees

The opposition is thus forced to argue that the decision below should be affirmed on the basis alone of Varity's statements as to MCC's financial viability. And their struggle to force that square peg into the round hole of "plan administration" in order to make it fiduciary conduct is evident in the tests they conjure up to make it so.

Plaintiffs devote a single, thoroughly unpersuasive, paragraph to their attempt to demonstrate that misrepresentations as to the "financial health and outlook" of MCC were fiduciary conduct (Pl. Br. 37-38) Plaintiffs contend that these communications "directly related" to "the security of employee benefit rights" because in the case of a self-funded plan "the security of benefits is directly tied to the financial health of the employer/plan sponsor". (*Id.* at 38)[18] But that

in December 1983. (PA 74a ¶ 90) That document stated, in solid capital letters at the bottom of its schedule of benefits, that "THE RIGHT IS RESERVED BY THE PLAN ADMINISTRATOR TO TERMINATE, SUSPEND, WITHDRAW, AMEND OR MODIFY THE PLAN IN WHOLE OR IN PART WITH RESPECT TO ANY CLASS OR CLASSES OF COVERED INDIVIDUALS AT ANY TIME." (JA 43).

Though conceding that Varity "may have had the right to terminate [plaintiffs'] welfare benefits" (U.S. Br. 26), the United States observes (U.S. Br. 2 n.1, 26 n.22) that the district court refused to give the 1984 reservation any effect, concluding that the reservation was "ambiguous" and that "a reasonable person . . . would not understand (from the 1984 CMMP Memo) that defendants were reserving a right to terminate welfare benefits in retirement." (PA 75a ¶ 93, 111a) The clarity of this reservation—not mentioned or disputed by the Eighth Circuit—is confirmed by the appellate court's ruling that similar language in the master plan document "*unambiguously* confers on the company the right to amend or terminate the Plan" and is "fatal" to any claim that benefits could not be terminated after retirement. (PA 9a) (emphasis added).

18 Even on its own terms, plaintiffs' theory is fanciful. That theory posits a misrepresentation that welfare benefits at MCC would be more "secure" than they turned out to be—continuous, unchanged benefits for 22 months before MCC went into receivership. But, in light of the Eighth Circuit's ruling that plaintiffs were never entitled to lifetime benefits and that under the plan's reservation of rights benefits could be terminated at any time (PA 9a), what "security" was ever promised but not delivered?

surely proves too much: the "security" of welfare benefits in a self-funded plan will always be affected by the financial health of the employer. The notion that because a plan is self-funded and thus tied in that sense to the employer's financial health cannot by itself mean that any alleged misrepresentation as to the financial future of MCC constituted the exercise of "plan administration". The statute provides no "self-funded" exception in its definition of fiduciary. Had Congress intended to provide employees with information concerning the prospects of a company whose "financial health" is directly tied to the "security of benefit rights", it surely would have affirmatively required such disclosure. It did not do so. Given ERISA's comprehensive regulation of employer and plan disclosure, such an omission is telling. *See Russell*, 473 U.S. at 146; *Mertens*, 113 S. Ct. at 2067, 2071.

Plaintiffs' argument effectively treats an employer's statements that welfare benefits in the future are expected to be "secure" as acts of "plan administration". Again, there is no statutory basis whatever for such a proposition and indeed every indication that ERISA does not regulate communications on the future "security" of welfare benefits but only information as to current benefits and procedures, changes in plan terms already made, and financial information as to the plan's preceding year. *See* ERISA §§ 101-104, 29 U.S.C. 1021-1024 (1988 & Supp. V 1993) (requirements for annual reports and plan summaries).

In fact, ERISA does not require that there be *any* "security" of welfare benefits. Congress clearly contemplated that the unpredictable costs of providing such benefits in the future and the changing economic realities of employers might lead (or force) companies to change or cut benefits. (*See* Pet. Br. 32-35) Employers are thus "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare benefit plans", *Curtiss-Wright*, 115 S. Ct. at 1228.[19]

19 While it is by no means clear that employers must disclose a reservation of rights in order to amend or terminate welfare benefits, *e.g.*,

Plaintiffs' proposed definition of fiduciary conduct as involving any communication relating to anything potentially bearing on the security of welfare benefits in the future is about five leaps away from any reasonable interpretation of "plan administration." It is not only virtually limitless in its scope, but would rewrite ERISA so as to transform employees (and the federal courts) into auditors of the employer's business.[20] " 'ERISA does not require that "day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants." ' " *Adams*, 905 F.2d at 947 (citations omitted; collecting cases from other circuits). This principle, grounded in ERISA's language and structure and recently reaffirmed by this Court in *Curtiss-Wright*, 115 S. Ct. at 1228, makes clear that certain employer conduct—including much conduct that may indeed have the effect of harming beneficiaries—is simply not the realm of ERISA.

The very structure of ERISA confirms that Congress could not have intended any rule such as that offered by plaintiffs. Rendering actionable alleged misrepresentations about future business decisions that might affect the security of benefits necessarily shifts the focus of any inquiry away from "reliance on the face of written plan documents", *Curtiss-Wright*, 115 S. Ct. at 1230, to routine oral or informal written communications between employers and employees. Reliability and consistency, central to ERISA's goal of protecting

Wise v. *El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993), in this case that right *was* clearly and unambiguously disclosed by Varity. Thus, even under plaintiffs' broad view of plan administration as including communications about the "security" of benefits, plaintiffs always knew their welfare benefits were not secure and could be lost at any time.

20 Thus, for example, under plaintiffs' theory, an employer responding to employee inquiries about whether it intends to purchase a company, or downsize a division, would be required, in order to avoid liability under ERISA, to fully describe its plans to do so because such plans might affect the "security" of welfare benefits.

both employer and employee by requiring plan terms to be written, would be lost.

The United States takes what it advertises as a somewhat less rigid "contextual" approach, but its rule is fraught with the same flaws as that proposed by plaintiffs. The United States would impose fiduciary liability for (i) intentional misrepresentation of information, (ii) that may foreseeably affect a beneficiary's choices relating to a plan, (iii) when the employer has a financial interest in the outcome and (iv) "communicates in a context in which it would reasonably be viewed to be speaking in its capacity as a plan fiduciary". (U.S. Br. 19)[22] Again, no statutory basis is offered as to why communications as to *business* decisions that might affect *future* benefits as measured by the *employee's* perspective are part of "plan administration" and the United States actually offers several reasons why Varity's communications fall out-

22 Relying on *Martin* v. *OSRCH*, 499 U.S. 144, 151 (1991), and *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-30 (1988), the United States argues that the rule proposed by the Secretary of Labor is entitled to deference. (U.S. Br. 19 n.17) That is not so. This is not a case about differing agencies' conflicting interpretations of regulations, *Martin*, 499 U.S. at 151, or indeed, about the interpretation of regulations at all. *Gardebring*, 485 U.S. at 151, 156; *see Ford Motor Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980) (agency interpretations of their own regulations subject to deference). Rather, this is a case in which the Secretary—for the first time, in this Court—" 'ask[s] [this Court] to defer to his *new* statutory interpretation . . . formulated during litigation.' " *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 114 S. Ct. 517, 531 (1993) (quoting *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992)). Indeed, this is a case where the Secretary seeks to interpret a statutory provision, but has previously "articulated no position on the question". *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988); *accord Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (no deference given to agency where it "cite[d] no administrative precedent" or prior "construction" to suggest that the agency "has in the past, so 'interpreted' " regulation). Moreover, the Court need not defer to an agency interpretation where it conflicts with the plain language at issue. *See John Hancock*, 114 S. Ct. at 531; *Gardebring*, 485 U.S. at 430.

side fiduciary conduct. The United States effectively concedes that this case is not about misrepresentations of plan terms (*see* U.S. Br. 26 n.23, 30), concedes that "a statement by a settlor of its intent" as to future benefits is non-fiduciary (U.S. Br. 28), and concedes that "generally" statements as to the benefit obligor's financial viability do not fall within the scope of "plan administration". (U.S. Br. 30) It nonetheless urges—even assuming a fully-disclosed reservation of rights (U.S. Br. 26)—that if an employee could view the totality of statements as "emanating" from the employer as a plan administrator, the employer should be held to be acting as a fiduciary.[23]

To be sure, the United States struggles mightily to propose a reasonable-sounding standard. But in its effort to concoct a test under which Varity's conduct is actionable, the United States limits liability not at all. It is difficult to imagine a situation involving *any* communication in any "context" as to future business decisions that might affect a participant's benefit choices that could not "reasonably" be viewed by employees as an act of a plan administrator, especially when employees directly ask about such intentions. How is an employer to know when its employees view it as acting as a plan administrator? What if, in the "context" of the communication, benefits are not explicitly mentioned at all, but an

[23] Thus, faced with no misrepresentations about current plan terms the United States is forced to argue that because Varity gave employees "written summaries of current benefits under the M-F and MCC Plans, and told the employees that their acceptances were required to ensure uninterrupted benefits"—*none* of which was false—during the same presentation in which Varity also stated that MCC was a financially viable entity, the latter statement, though not "generally" "within the scope of plan administration" was transformed into a fiduciary act because it was "intertwined" with communications respecting "current benefits". (U.S. Br. 30) But the United States has already conceded that representations about current benefits were *true*. The circuity and illogic of such reasoning well illustrates its ends-oriented goal.

employee nonetheless views benefits issues as central to any actions he or she takes?

Aside from having little if any basis in the statutory language, the United States' position, like plaintiffs' position, would undo all of ERISA's carefully balanced rules as to reliance by both employers and employees on written plan terms and limited disclosure of certain information at certain time periods, and the most basic difference between pension and welfare benefits: that employers may unilaterally terminate welfare benefits at any time outside of ERISA fiduciary standards.

Once the result-oriented tests offered by the opposition are discarded in favor of a straight-forward look at ERISA's language and structure, the result becomes plain: Varity's conduct about MCC's prospects may not be measured by § 404(a)(1) fiduciary standards as it was not undertaken in the course of plan administration. Particularly in the context of welfare benefits, "plan administration" can only mean to "manage" or "conduct", *Webster's Third New International Dictionary* 27-28, 1372, 474 (1961), the plan according to its current terms and according to all the specific ERISA provisions governing welfare benefit plans. The undisputed facts are that Varity never misrepresented the terms of the plan or promised that benefits would last for any particular length of time and that plaintiffs were advised in a written ERISA document through a reservation of rights that benefits *could* be terminated. All fiduciary duties were fulfilled.

CONCLUSION

The ruling of the court of appeals should be reversed to the extent it affirmed liability against Varity.

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